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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

CHANDLER J. WALKER, Petitioner

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHANDLER J. WALKER, your petitioner, prays that a Writ of Certiorari issue to review the denial of his Petition for Hearing by the Supreme Court of the State of California entered February 28, 1967; and effective on issuance of remittitur March 7, 1967.

OPINIONS BELOW

The Minutes of the Supreme Court of the State of California, denying the Petition for Hearing are reported at 65 A. C. No. 30, Minutes 3, and is printed in Appendix "A" hereto, infra, p. 20.

The opinion of the California District Court of Appeal, Third Appellate District, as modified January 5, 1967, is reported at 247 A.C.A. 632, 55 Cal. Rptr. 726, and is printed in Appendix "A" hereto, infra, p. 1.

The Order of Probation of the Superior Court of the State of California in and for the County of Sacramento is not reported, but is printed in Appendix "A" hereto, infra, p. 21.

JURISDICTION

1. The Denial of Petition for Hearing by the Supreme Court of the State of California was entered February 28, 1967; remittitur was issued on said denial March 7, 1967, and is final.

2. The federal constitutional questions were raised as indicated at pp. 8 and 9, infra.

3. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code, Section 1257(3).

QUESTIONS PRESENTED

Whether petitioner was deprived of his rights protected by the:

1. Due process clause of the Fourteenth Amendment to the United States Constitution in that he was convicted under penal provisions which were so indefinite and vague as to afford no ascertainable standard of

criminality.

2. Due process clause of the Fourteenth Amendment to the United States Constitution in that he was denied a fair trial.

3. Due process clause of the Fourteenth Amendment to the United States Constitution in that he was convicted when he had no competent counsel to represent him in the trial court.

STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

The statute describing the situations in which a Writ of Certiorari may be sought from a state court decision, 28 U. S. Code, Section 1257(3), reads in pertinent part as follows:

> "By writ of certiorari,...when the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution...as where any...right...is specially set up or claimed under the Constitution...of ...the United States."

The Penal Code sections of the State of California involved herein are set forth in Appendix B, infra.

STATEMENT

CHANDLER J. WALKER (hereinafter referred to as Petitioner), was charged by the Grand Jury of the County of Sacramento by an indictment filed on November 24, 1964, with three Counts of the crime of perjury. The case came on regularly for trial by jury on March 10, 1965; and on March 29, 1965, the jury returned its verdict, finding Petitioner guilty as charged in each of the three Counts. On April 19, 1965, Petitioner filed a motion for a new trial which was denied on April 26, 1965.

On April 26, 1965, the passing of judgment and sentence was suspended and probation was granted for a period of three years, Petitioner being ordered to serve three months in the County Jail on each of the three Counts, Count I and III to run concurrently with each other and consecutively with Count II.

On April 5, 1965, Petitioner filed timely notice of appeal. The Third Appellate District Court of Appeal of the State of California rendered its Opinion on January 4, 1967, which was thereafter modified on January 5, 1967. Petitioner thereafter timely filed his petition for rehearing in the District Court of Appeal on January 18, 1967, which said petition was denied January 26, 1967.

Petition for Hearing was filed February 6, 1967, in the Supreme Court of the State of California. On February 28, 1967, said petition was denied. Remittitur was issued on

said denial March 7, 1967.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. California Penal Code Section 118, in defining perjury, states in substance that every person who, having taken an oath to testify truthfully, and who then wilfully states a falsehood is guilty of perjury. Petitioner was found guilty of this section and said conviction was upheld on appeal based on California Penal Code Section 121 which states in substance that it is no defense to prosecution for perjury that the accused did not take the oath to tell the truth but merely caused an officer, who could administer the oath, to certify that the oath had been taken. These two statutes when read together, then, purport to state, as interpreted by the California Courts below, that one can be guilty of perjury, that is, wilfully testifying under oath to a falsehood, even though that person is not under oath.

The vagueness of these statutory provisions certainly appear on their face. As stated in Giaccio v. Pennsylvania, 382 U. S. 399, 15 L.ed. 2d 447, 86 S. Ct. 518 (1966):

> "It is established that a law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves

> the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards what is prohibited and what is not in each particular case."

See also Baggett v. Bullitt, 377 U. S. 360, 12 L.ed. 2d 377, 84 S. Ct. 1316.

With regard to the instant case the vagueness of the statutory scheme is even more evident. As stated in numerous United States Supreme Court opinions a statutory scheme is not looked at in the abstract, but rather as applied to the facts before the court. See U. S. v. National Dairy Products Corporation, 372 U. S. 29, 9 L.ed. 2d 561, 83 S. Ct. 594, reg. den. 372 U. S. 961, 10 L.ed. 2d 13, 83 S. Ct. 1011. Here petitioner was prosecuted for signing his name to a deed of trust, as a witness, when he had in fact not witnessed the signatures of the trustors, even though the notary public stated on direct examination and cross examination that he had not sworn the petitioner prior to his signing said trust deed.

2. Petitioner was denied a fair trial because of the adverse publicity prevalent in the Sacramento area regarding aluminum siding personnel, coupled with the numerous remarks by the prosecution that petitioner was one of the "suede shoe boys." During the period of the trial herein, state and local law enforcement agencies were prosecuting members of the aluminum siding industry for their sharp

practices in procuring customers for aluminum siding contracts. Petitioner, though supposedly being prosecuted for perjury, was in effect found guilty of being a "suede shoe boy" by association with the aluminum siding industry. The record is replete with irrelevant testimony as well as prosecution remarks relating to the aluminum siding industry. The local press carried front page stories on the industry as a whole, and these, coupled with the argument of the Deputy District Attorney, could not help but influence the jury. Trial by jury and a fair hearing by the Court, as opposed to a hearing in the newspapers and the community as a whole, has long been the criteria set down by this Honorable Court. Estes v. Texas, 381 U. S. 532, 14 L.ed. 2d 543, 85 S. Ct. 1628, and cases cited therein.

3. Petitioner, in the trial court, was denied his constitutional right to the assistance of counsel. The Sixth Amendment to the Constitution of the United States, now incorporated into the Fourteenth Amendment and made applicable to the States, provides in part that: "...and to have the Assistance of Counsel for his defence." This Court, in the landmark case of Gideon v. Wainwright, 372 U. S. 335, 9 L.ed. 2d 799, 87 S. Ct. 792, held that an accused had the right to counsel in a state court prosecution. In its reasoning the court stated at pages 344-345:

"A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U. S., at 68-69."

In discussing the right to counsel, this Court, as well as the Constitution, refers to the "Assistance of Counsel." This certainly must imply that counsel be competent to render the needed assistance to the accused. If such counsel not be competent then he could no more aid the accused in determining whether an indictment is good than could the accused himself. So also if his counsel not be competent then he could not determine or properly raise the unconstitutional nature of a statute under which the accused was charged.

A reading of the transcript illustrates that trial counsel in the instant case nowhere raised the constitutional argument that the statutory scheme under

which the petitioner was convicted is void for vagueness. The only constitutional issue presented to the trial court for its consideration was whether a fair trial had been allowed the petitioner. (Tr. p. 411 et seq.)

In the case of Anders v. California, 35 L.W. 4385, No. 98 - October Term, 1966, the Court discusses counsel for the accused as necessarily being an advocate and not merely acting as amicus curiae. See also Ellis v. United States, 356 U. S. 674, 675 (1958).

Mr. Justice Fortas, with whom Mr. Justice Douglas joined, in dissenting from the denial of certiorari in Sandoval et ux. v. Rattikin, Trustee, 385 U. S. 901, expresses his concern with the need for competent counsel to fulfill the Constitutional requirement of the Sixth Amendment, at page 902:

> "To some extent, a lawyer's client like a doctor's patient must suffer the consequences of his champion's mistakes. But there are limits; and the courts are and should be quick to relieve the client of his lawyer's default whenever that is feasible and does not result in unfairness to others. See Mr. Justice Black's dissent from the denial of certiorari in Santana v. United States, ante p. 848."

Counsel here went through the motions of defending petitioner but nowhere raised the constitutionality of the Penal Code Sections here involved, or the conduct of the prosecutor.

The trial record establishes that the petitioner was improperly prejudiced in the minds of the jury and their

passions inflamed in each of the following respects, without objection being raised by trial counsel:

1. The prosecution was permitted to introduce evidence of fraud and chicanery on the part of the defendant's salesmen which was unconnected in any way with defendant on the charges before the Court. (Tr. 300, 301, 316, 317).
2. The prosecution was permitted to impugn defendant by intruducing evidence that defendant made no investigation of his salesmen before employment. (Tr. 376).
3. The prosecution was permitted to impugn defendant by introducing evidence that defendant had no knowledge whether the salesmen had local permits. (Tr. 367, 368, 370, 373).
4. The prosecution was permitted to impugn defendant by evidence that:
   (a) The contract price for work included substantial sums returned to them by check or cash in the nature of a rebate. (Tr. 394, 398).
   (b) The fact of these rebates was not reported by defendant to his supplier, Alcoa Aluminum Co. (Tr. 398).
   (c) The salesmen asked the customers not

to mention the rebates to Alcoa. (Tr. 400, 401).

This lack of timeliness in raising an objection based on the United States Constitution has so far prevented a reversal of the conviction, and is raised in this Court of last resort by attorneys for the petitioner because of our duty to preserve his constitutional rights in our own role as advocates.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

CLARENCE H. PEASE
LALLY, MARTIN, CHIDLAW & VIETS

Clarence H. Pease

CLARENCE H. PEASE
Attorneys for Petitioner

DATED: May 31, 1967

Appendix "A"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs
CHANDLER J. WALKER,
Defendant and Appellant.

3 Criminal No.3886

Filed: Jan. 4, 1967

Chandler J. Walker was convicted of three counts of perjury. (Pen. Code, sec. 118.) Pronouncement of judgment was suspended and probation granted. He properly appeals from the order granting probation.

The crucial question presented on this appeal is whether an oath was taken by Walker before a notary public with sufficient formality to permit a charge of perjury within the meaning of section 118 of the Penal Code.

We hold there were irregularities in the manner in which the notary administered the oath to Walker but that an oath was administered and that perjury was proved. Other points urged for reversal are without merit and the judgment should be affirmed. Explanation of our holding will follow a statement of the facts.

Walker was the former owner of the West Coast Construction Company, and as such he was in the home improvement business specializing in the sale of aluminum

products. He employed salesmen whom he described as "independent contractors." These salesmen actually secured the orders.

Three sales by the Walker organization are involved in three counts of perjury prosecutions on which Walker was convicted. A discussion of one of these sales in detail will suffice for the purposes of this opinion.

This was a sale by these "independent contractors" to Willis Dunbar and his wife. They agreed to have aluminum siding and a roof and canopy placed on their home for the sum of $3,000. To their knowledge they signed only a credit report and a job authorization order. These were in the form of a printed pad with carbon paper inserted between counterparts. The salesman told the Dunbars that they would have to sign a third copy of the credit application because the carbon paper had not shown an impression of their signatures on the third counterpart. They did so, believing they were only signing the credit application. A work completion order was signed upon completion of the job. Dunbar testified that at no time did he sign a deed of trust; Mrs. Dunbar's testimony was similar to that of her husband's; and she too testified that she never knowingly signed a deed of trust. In fact the proposition that a

deed of trust would be given had never been discussed.

A deed of trust was introduced signed by the Dunbars. It also included what was proved to be the signature of Walker "as witness." A form in the following language appears thereon:

"[P]ersonally appeared Chandler J. Walker, personally known to me to be the person whose name is subscribed to the within Instrument, as a witness thereof, who being by me duly sworn deposes and says: That he resides in Sacramento and that he was present and saw Willis F. Dunbar & Lily B. Dunbar personally known to him to be the same persons described in and whose names are subscribed to the within Instrument as Buyers, execute and deliver the same, and said Buyers acknowledges (sic) to said affiant that they executed the same; and said affiant subscribed his name thereto as a Witness." This form was signed by Leonard C. Silvani, a notary public. The form is partially a printed form. The personalized portions were proved to have been written in by Walker who presented the instrument to Silvani to be notarized.

Walker, who testified in his own behalf, admitted that he had not seen the Dunbars sign the deed of trust. His defense to the charge of perjury was that he was not under oath when he appeared before the notary.

Silvani, the notary, testified that Walker was under oath. In addition to being a notary, Silvani was engaged in the real estate mortgage business. He testified that Walker, periodically during the period when the transactions involved in the prosecution occurred, had called upon him to perform notarial duties. His testimony as to the manner in which he had administered the oath is equivocal. We have set forth material portions in a footnote.[1]

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[1]On direct examination he testified: "Q. [D]id you swear him to the contents of that acknowledgment? . . . A. Yes. He was under oath, yes. Q. All right. So in essence, and correct me if I'm wrong, you asked Mr. Walker whether or not he had observed the Dunbars place their signatures to that document? A. Yes. Q. And he said 'yes'? A. Yes. Q. And you asked him whether or not the contents of that acknowledgment were true, is that correct? A. I don't recall asking him. Q. To what you would swear him is true, is that correct (Mr. Railey [the prosecuting attorney] then raised his hand demonstrating to the witness what he meant)? A. Yes. Q. And what was his response to that? A. He replied yes. Q. All right, that's what I want to know. . . . Q. Altogether, approximately how many times . . . had Mr. Walker appeared before you and been sworn? . . . Q. That he observed the signatures of these trustors to these Deeds of Trust? A. I'd say several. I don't know exactly."

He testified on cross-examination when asked how he had administered the oath to Walker: "Well, there was nothing--nothing physical. I asked Mr. Walker, 'Did you witness that signatures'? And I mentioned the name of the trustors and he replied affirmatively and then I might add that in this inception when I first started notarizing documents for him that I told him at that time any documents notarized you had to be under oath to have them notarized. And maybe the format wasn't what it should be, but--he was under oath. There was no

(continued on next page)

The evidence regarding the other charges is similar. It is unnecessary to discuss them in detail. The prosecution showed with reference to the charge involving other customers (Houston and Herise Brengettsey) that Walker had told a deputy district attorney that he had signed the deed of trust as a witness to their signatures but without actually having been present when they signed; that he had written up the certificate before presenting it to Silvani and had obtained Mr. Silvani's signature as the notary and that the notary's seal had been affixed. (He also stated that in all cases this procedure was for the purpose of making it possible for him to record the deeds of trust.)

(continued from page 4).

raising of the hand or anything. I asked him if he witnessed the signatures and he had."

Later he testified: ". . . I considered he was under oath, and he knew it."

In response to a question by the court: "[W]hen Mr. Walker came in to your office, did he raise his right hand and solemnly swear that the writing he was going to make was the truth, the whole truth and nothing but the truth, did he do that? A. Not in that terminology, no."

On redirect: "Q. . . . Now are you convinced that he understood he was swearing to the authenticity of those signatures? A. Yes. Q. Would you tell him? A. Would I tell him he was swearing to the authenticity? Q. Yes. A. I would tell him that."

As to his understanding about being under oath Walker had stated to the attorney: "Q. And Mr. Silvani, did you appear before him personally at that time? A. Yes, I did. Q. And did he administer an oath? A. I would say so. Q. Yes. Now had you really witnessed their signatures on this document? A. No, I had not."[2]

Government Code section 27287 provides in part here material: "[B]efore an instrument can be recorded its execution shall be acknowledged by the person executing it . . . or proved by subscribing witness . . .

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[2]In his testimony at the trial Walker retracted this statement. After having admitted he had not actually witnessed any of the signatures on the deeds of trust, he testified on direct examination: "Q. Do you recall the details on each time you went [before Silvani to have his proof of signature as witness notarized] on each particular one? A. No. Q. You don't recall any? A. I don't recall the details, no. . . . Q. Do you have any explanation as to why you appeared before Mr. Silvani and said that you witnessed the signatures when you weren't the one that did witness them; somebody else did. Do you have any explanation for the jury and the court? A. Well, I treated it--this, prior to the first contact with the District Attorney's Office--I treated the deeds of trust in a rather careless and light fashion. . . ."

He later testified: "Q. Well, if you don't recall--I mean, your testimony is you don't recall having transacted the notarization, so you couldn't recall as a basis where you admit you were sworn or administered an oath? The question is -- [A colloquy between counsel and the court followed] Q. Mr. Walker, on any occasion did Mr. Silvani swear you in and did you take an oath on any of the notarizations involved in this proceeding, or at any time? A. No. Q. And I'm making reference to the raising of the hand and things like that? A. No."

and the acknowledgment of proof certified as prescribed by law."

An "acknowledgment" is not here involved; there was a purported proof by a purported subscribing witness with a purported sworn certificate. Such proof, of course, under oath, with the notary's certificate is a prerequisite to recordation. (Govt. Code, sec. 27287, supra.) The evidence shows Walker knew this. It was his purpose to obtain a recordation of the deed of trust established to have been obtained fraudulently. The latter act is not that for which he was being prosecuted. This does not mean that knowledge of the necessity of an oath is unimportant.

Section 118 of the Penal Code provides in part that "Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent . . . person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false. . . is guilty of perjury."

A false statement pursuant to the proof or acknowledgment of an instrument before a notary public may be the basis of a charge of perjury. (Ex parte Carpenter, 64 Cal. 267; Civ. Code, sec. 1181; see also

People v. Teixeira, 59 Cal.App. 598.) This rule, of course, applies to an oath administered by a notary on a proof by a subscribing witness.

To convict one of the crime of perjury in violation of Penal Code section 118 it must be proved that the defendant: (1) took an oath that he would testify, declare, depose or certify truly before (2) a competent tribunal or person (3) that such oath was taken in a case in which an oath may be lawfully administered, and (4) that the accused wilfully and contrary to such oath stated as true, a material fact which he knew was false. (People v. Gilbert, 217 Cal.App.2d 662, 666; People v. Baranov, 201 Cal.App.2d 52, 57-58.)

The manner of administering an oath in "an action or proceeding" is carefully spelled out. (Code Civ. Proc., sec. 2094.) Singularly enough we find no special form prescribed for the administering of an oath when, as here, a party is certifying to his act of witnessing the signatures to an instrument in writing.

Section 121 of the Penal Code provides: "It is no defense to a prosecution for perjury that the oath was administered in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such

officer to certify that the oath had been taken or administered."

Although no California authority, applying this section has been cited by counsel (and we find none) with facts paralleling those of the case at bench, there are cases which assist us in determination of the problem presented.

In Peters v. City and County of San Francisco, 41 Cal.2d 419, our Supreme Court has stated (at p. 426): "The claim may be regarded as a 'verified' one within the meaning of the statute although plaintiff did not appear before a notary to sign the verification. (Cf. Germ v. City & County of San Francisco, 99 Cal.App.2d 404 [222 P.2d 122] [involving an identical provision in the city charter].) The object of requiring verification is to hold the claimant responsible for any false statements made in the claim, and, as pointed out in the Germ case, it is no defense to a prosecution for perjury that the person accused of swearing falsely 'did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered.' (Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 413-414 [222 P.2d 122]; Pen. Code, sec. 121; see People v.

Darcy, 59 Cal.App.2d 342 [139 P.2d 118].) It may be inferred from the evidence that plaintiff was aware that she was required to sign the verification under oath, and her attorney caused the notary to certify that plaintiff had sworn to the statement made in the claim. Accordingly, it appears that there has been substantial compliance with the statutory requirement of verification."

The case before us shows, we think, closer compliance with the requirements of oath-administration than was present in Peters, supra.

In People v. Brown, 125 Cal.App.2d 83, it was held (at p.88) that it was not necessary that the words "oath", "swear" or "depose" be used. There evidence was given that defendant had raised his hand in making his statement. (Here Silvani had indicated on direct examination that Walker had raised his hand, but the weight of this testimony was, it must be recognized, lessened by his admission on cross-examination that "there was nothing physical" in the administering of the oath. Also when the court asked the compound and leading question, ". . ..did he raise his right hand and solemnly swear that the writing he was going to make [NB, that Walker had already made the writing] was the truth, the whole truth and nothing but the

truth, did he do that? the answer was: "Not in that terminology, no." Unexplored was the exact, or the gist of, the terminology which was used. (See footnote 1.)

In People v. Darcy, 59 Cal.App.2d 342, the court states (at p. 350): "A person who, being required by law to make a statement under oath, willfully and knowingly falsifies such statement, purportedly made under oath, in any particular, is guilty of perjury as a matter of law whether or not the oath was in fact taken (sec. 129), . . . and the offense is complete upon delivery of the affidavit to another person, with the intent that it be uttered or published as true."

Turning to other jurisdictions, we find cases with facts similar to the case before us.

In State v. Anderson (Kans.) 285 P.2d 1073, a deputy sheriff went before a county judge and as a result of the statements he made a complaint was prepared. The complaint stated: "Duane Anderson being duly sworn, on oath says . . .." After the complaint was prepared it was executed by the deputy and a warrant was issued and a party arrested. In the prosecution for perjury against the deputy, he claimed that he was not under oath, as the judge charged with administering the oath, signed the same in silence and without state-

ments or questions to the deputy. There was at the time a Kansas statute requiring the laying of the right hand on the Holy Bible in the taking of an oath. The court said, however, ". . . it is common knowledge that such requirements are not always complied with strictly. The question is whether under the circumstances what was done was [a] . . . nullity." The court pointed out that the deputy read the statement after the judge prepared it and further commented: "Surely some weight must be given to opening statements of the complaint and to the physical acts of the party even though statutory formalities were not observed." The theory of the court was that there was nothing to show that there was a design by either the judge or Anderson to have Anderson "unsworn." Thus, silence did not outweigh the wording of the certificate and the actual signing in view of the fact that there was nothing from which it could be concluded that the party intended not to be sworn. In the case at bench Walker not only read the statement, he had prepared it.

There is a comprehensive note (as of 1927) in 51 American Law Reports 840 on cases covering the formalities required in the administering of oaths. The note is annotation to a reported case, Atwood v. State of Mississippi (Miss.) 111 So. 865, 51 A.L.R. 836. There

the questioned "oath" was administered by a justice of the peace to an affidavit for a search warrant. The officer did not require the affiant to hold up his hand to be sworn, nor was there formal oral administration of the oath; but as the opinion states (on p. 838 of 51 A.L.R.), "the evidence shows, without conflict, that both the affiant and the justice of the peace knew and realized that an oath was necessary before a search warrant could be obtained, and that they considered what was done at the time the oath was signed by the affiant and the warrant issued by the justice of the peace to be sufficient in law to constitute an oath. . . . Both of them understood, without anything being said to that effect, that the affiant was making the necessary affidavit to obtain the search warrant."

In the note in 51 American Law Reports 840 et seq. other authorities expressing rigid rules are cited as well as those stating liberal rules. We take the position that the California Legislature, by the provisions of Penal Code section 121, has committed this state to a liberal policy in ruling upon the question whether compliance with formalities in oath taking has been had. We pay willing obedience to that rule. The busy business world of today inevitably spawns informality in the performance of ceremonial functions, particularly

those which are (at least in some respects) the vestiges of a more ritualistic era. We look, modernly, to substance more than form. In the field of law into which this case falls the manifested intent with which an act is done should weigh more heavily than the observance of punctiliousness in its ceremonial aspects. Symbolism should not be confused with solemnization. Here, although considerably doubt attends the testimony, both of the notary and of defendant Walker as to just what acts did occur when the "proof" was made and certified to, there is no question whatever about the following: (1) Walker himself prepared--wrote out--the very form which states, "Chandler J. Walker . . . being by me duly sworn deposes and says . . ."; (2) Walker had the specific intent to make the statement as a sworn statement, and he was well aware that the instrument would be regarded as one sworn to--to the end that it could be placed of record; (3) he approached the notary to have the necessary form notarized; (4) he was informed by the notary to the effect that he, Walker, would be regarded as being under oath, and (5) both the notary and Walker regarded the latter as being under oath. We hold under the facts related there was sufficient substantial evidence before the jury, adequately instructed, to justify its implied finding that the formalities of

oath taking had been complied with.[3]

Walker also contends that adverse publicity had a profound prejudicial effect upon the fairness of his trial. It is asserted that there was almost a fairly front page feature story in the local press setting forth accusations made against "unethical practices in the aluminum siding industry."

The record does not show any motion for a change of venue made. A defendant may not claim for the first time on appeal that he was deprived of a fair trial before an unbiased jury because of newspaper publicity where with full knowledge of the publicity he made no objection and failed to move for a change of venue. (People v. Magee, 217 Cal.App.2d 443.) Moreover, there is no showing in this record either of the extent or

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[3]Even on the question as to whether there was actually a hand-raising ceremony there is conflict. Silvani's direct testimony that there was suffers by his statements on cross-examination, particularly his negative answer to the judge's question. (See footnote 1, supra.) But Walker acknowledged that on one occasion at least he had been sworn. Silvani testified there was a solemnization ceremony of some sort. Our code spells out no particular words which must be used; on the contrary it condones informality of fact. Where there is a conflict in the testimony a reviewing court does not reweigh; we do not have to be convinced of a fact necessary to establish guilt beyond a reasonable doubt; our inquiry ends when we find substantial evidence from which a jury reasonably could be so convinced. (People v. Hall, 62 Cal.2d 104, 109-110; People v. Robillard, 55 Cal.2d 88, 93; People v. Daugherty, 40 Cal. 2d 876, 885.)

scope of the adverse publicity or that it was impossible to secure an impartial trial.

Appellant claims that the prosecution inflamed the jury with reference to Walker and his salesmen as "suede shoe boys" and "aluminum siding racketeers." There is a reference to "suede shoe boys" in the argument by defense counsel on motion for a new trial. The district attorney's arguments to the jury are not in the record. We have no way of knowing whether the remark was made; if made, whether they were objected to or in what context the statements were uttered. An appellate court will not consider statements of error asserted in a breif which are not supported by the record. (People v. Boyden, 181 Cal.App.2d 48; People v. Deriso, 222 Cal. App.2d 478.)

Moreover, perjury is a specific intent crime. (People v. Guasti, 110 Cal.App.2d 456, 464.) As we have shown, proof by the prosecution that Walker intentionally swore falsely to serve his nefarious purposes was an important factor in the state's case. There was overwhelming evidence that his purposes were iniquitous. A prosecuting attorney may use appropriate epithets warranted by the evidence. (People v. Mitchell, 63 Cal. 2d 805, 809.) We see no reason to exclude such an epithet merely because it is one properly catalogued as

being within the vulgate.

The purported appeal from the order denying the motion for new trial is dismissed. The judgment is affirmed.

Pierce, P. J.

I concur:

Regan, J.

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CHANDLER J. WALKER, Defendant and Appellant.	)	3 Criminal No. 3886
	)	Filed: JAN - 5 1967

MODIFICATION OF OPINION

BY THE COURT:

The typewritten opinion of this court in the above entitled case filed January 3, 1967, is modified as follows:

On page 11, last paragraph, strike the word "judgment" and insert the following: "order granting probation." The sentence will then read: "The order granting probation is affirmed."

IN THE

District Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

RECEIVED
JAN 27 1967
Lally, Martin, Chidlaw & W

PEOPLE OF THE STATE OF CALIFORNIA

vs. 3 Crim. 3886

CHANDLER J. WALKER

By the Court:

Appellant's petition for rehearing is denied.

Dated: January 26, 1967

PIERCE, P. J.

- - - - - - -

cc-Attorney General (Nelson Kempsky)

William T. Swaigert
James P. Carroll

Reporter of Decisions

FILED
JAN 26 1967
DIST. COURT OF APPEAL-THIRD DIST.
WILFRIED J. KRAMER, Clerk
By _____ Deputy

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA — 3 Criminal

vs. — No. 3886

CHANDLER J. WALKER

By the Court:

Appellant's petition for hearing denied.

DATED: February 28, 1967

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 28702 Department 5

Hon. ELVIN F. SHEEHY
Judge of the Superior Court

PEOPLE OF THE STATE OF CALIFORNIA,

vs.

CHANDLER J. WALKER, Defendant.

ORDER OF PROBATION

WHEREAS, on the 29th day of March, 1965, the said defendant appeared before the Court and was found Guilty by a jury of the crime of Perjury, as charged in Counts 1, 2 and 3 of the Indictment, and made application for probation; and

WHEREAS, on this date the Court being fully advised and having considered the report heretofore filed by the Probation Officer in the above entitled case;

IT IS ORDERED that the matter of passing judgment and sentence is suspended for a period of three (3) years, during which time the defendant, CHANDLER J. WALKER, will be on probation; and

IT IS FURTHER ORDERED that said defendant, CHANDLER J. WALKER, be and he is hereby confined in the County Jail of the County of Sacramento for a period of three (3) months as to Count 1, and that said defendant be and he is hereby confined in the County Jail of the County

of Sacramento for a period of three (3) months as to Count 2, said term to be served consecutively as to the term of confinement as to Count 1, and that said defendant be and he is hereby confined in the County Jail of the County of Sacramento for a period of three (3) months as to Count 3, said term to be served concurrently as to the term of confinement as to Count 2, the same to constitute the first six (6) months of this Order of Probation; and

It is the Order of the Court that you, CHANDLER J. WALKER, shall, during your term of Probation, comply in all respects with the following General Conditions of probation as authorized by the provisions of the Probation Statutes of the State of California. Further, that you shall comply in all respects with any Special Conditions of Probation contained in your Order of Probation or which may subsequently be ordered by the Court or the Probation Officer.

1. Obey all Laws applicable to you.
2. Live a respectable, honest, and temperate life.
3. Keep only good company and respectable hours.
4. Not frequent or visit any undesirable establishment or places.
5. Be gainfully employed at employment approved by the Probation Officer having your supervision; not voluntarily change employment without having first gained approval for such change; or if discharged, or if your employment is terminated (either permanently or temporarily) for any cause whatsoever, you are to notify your Probation Officer within 48 hours.

6. You are not to remain away from your regular residence for more than 24 hours without first having secured permission from your Probation Officer. You are to notify your Probation Officer at once of any intended change of address and the reasons therefor.

7. You are to contribute regularly to the support and maintenance of all those for whose support and maintenance you are legally responsible.

8. You are to follow in all respects any reasonable instructions given to you by the Probation Officer having your supervision.

9. You are to report in person to the Division of Adult Probation at such times and dates as the Probation Officer having your supervision may direct. (If for any reason beyond your control you are unable to report on your assigned date and time, you shall communicate this fact to the Division of Adult Probation on or before the assigned date.)

10. You shall allow Probation Officers to visit your home and places of employment at reasonable times.

You are hereby advised that failure by you to comply with all of the foregoing General Conditions of Probation or any Special Conditions of Probation will make you liable (1) to have this probation revoked, extended, or amended which may result in the imposition of any sentence the Court could have imposed on you before you were placed on probation; (2) your confinement in the County Jail for intermittent periods; (3) the extension of your probation up to the maximum provided by law; (4) the change of or adding to the conditions of your probation within the limits of the Probation Statutes.

The term of this order of probation shall be three

(3) years.

Done in open Court this 26th day of April, 1965.

ATTEST:

C. C. LaRUE, Clerk,

By s/ G. L. Swetzer
Deputy

s/ Elwin F. Sheehy
Judge of the Superior Court

The foregoing terms and Conditions of Probation have been explained to me and I fully understand them and agree in every particular to abide by them.

Date _____ _____
Probationer

Witnessed by: _____
Officer

Sec. 1203.4, Penal Code: PROBATIONER MAY WITHDRAW PLEA OF GUILTY

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such

defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021.

APPENDIX "B"

California Penal Code Section 118:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which such testimony, declarations, depositions, or certification is permitted by law under penalty of perjury and wilfully states as true any material matter which he knows to be false, is guilty of perjury."

California Penal Code Section 121:

"It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered.

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C. C. P.

STATE OF CALIFORNIA)
) ss.
County of Sacramento)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 926 J Building, Sacramento, California.

On the 2nd day of June, 1967, I served the within Petition for a Writ of Certiorari to the Supreme Court of the State of California on the below named in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

Honorable Thomas C. Lynch
Attorney General of the State of California
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814

DATED: This 2nd day of June, 1967.

I declare under penalty of perjury that the foregoing is true and correct.

Clarence H. Pease